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Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for meeting on 28 November 2005

Recovery agents

Purpose

This paper provides information on the past discussions of Members of the Legislative Council on issues relating to companies/organisations which assist victims of personal injuries to claim compensation on the basis that they will only charge a fee if the victim succeeds in his claim.

2 Various names have been used to describe such companies/organisations. This paper adopts the one used by the legal professional bodies in their recent submissions to the Panel on Administration of Justice and Legal Services, i.e. “recovery agents” (RAs).

Consideration by the Panel on Administration of Justice and Legal Services

3. The Panel had not discussed issues relating to RAs as an agenda item. However, reference was made to recovery agents in the past discussions of the Panel on legal aid services.

4. In the 2001-02 session, the Panel conducted a review of the current legislative framework of legal aid services and received views from deputations, including the Association of the Rights of Industrial Accident Victims, on the relevant issues. The Association advised the Panel that as many accident victims were not eligible for legal aid under the existing financial eligibility limits of the legal aid schemes, they had resorted to entering into contracts with RAs which claimed to be able to help them in their claims for accident compensation. These agents operated on the pledge of “no win, no charge” and would take a percentage of the compensation received as their service fees if the claims were successful.

5. At its meeting on 14 December 2004, the Panel was briefed on the outcome of the 2004 annual review of the financial eligibility limits for legal aid applicants. Representatives of the legal professional bodies considered that instead of making minor amendments to the financial limits, a fundamental review of the legal system was necessary. They pointed out that many persons not eligible for legal aid had turned to RAs to pursue their claims for compensation. As RAs operated for profits,

they would not act in a conscientious manner to protect the rights and interests of their clients as qualified lawyers would do. The Panel noted that the Law Society of Hong Kong had set up a working group to look into the matter and would come up with some preliminary views in a few months' time. The Panel agreed to follow up the matter in due course.

Questions and debates in Council

6. Issues relating to RAs were raised by Members in Council on the following occasions –

- (a) Hon Margaret NG raised an oral question on “Agents handling claims for accident compensation” at the Council meeting on 12 June 2002;
- (b) Hon Margaret NG and Hon LI Kwok-ying expressed concerns about the problems relating to recovery agents during the debate on the 2005 Policy Address at the Council meeting on 26 January 2005; and
- (c) Hon LI Kwok-ying raised a written question on the “Operation of claims companies” at the Council meeting on 15 June 2005.

7. In view of the growth in the activities of RAs and the social implications arising, Members requested the Administration to look into the propriety, desirability and legality of the operation of RAs from both the public's and the profession's point of view, and consider deterrent measures, including instituting prosecutions and introducing legislation to regulate RAs. Some members considered that the emergence of RAs was mainly attributable to the fact that a lot of the accident victims were ineligible for legal aid or unable to afford the litigation costs, and asked the Administration to consider reviewing the legal aid policy.

8. In her replies to Members, the Secretary for Justice (SJ) explained that under common law, assisting or encouraging a party to file a lawsuit might constitute such civil or criminal offences as maintenance or champerty. However, up to June 2005, there had been no case in which sufficient evidence of an offence by a RA had been produced to DOJ to warrant a prosecution.

9. On the legality of RAs, SJ advised that there were certain offences under the Legal Practitioners Ordinance and at common law, and certain types of legal professional conduct, that were relevant to RAs. However, non-lawyers could provide certain types of assistance in the recovery of accident compensation, even on a contingency basis, without breaching these provisions. For example, the provision of assistance to a litigant to collect information before a lawsuit by voluntary agencies was not prohibited under the Legal Practitioners Ordinance and does not constitute an act of champerty. SJ further advised in June 2005 that there was insufficient justification for introducing legislation to regulate RAs.

10. As far as legal aid services were concerned, the Administration advised that it had in place a comprehensive mechanism and timetable to review the financial eligible limits of legal aid applicants. These regular reviews should be sufficient in ensuring that the limits kept pace with the economic realities.

11. For details of Members' concerns and the Administration's responses, members are requested to refer to the extracts from the Official Records of Proceedings of the Council meetings on 12 June 2002, 26 January 2005 and 15 June 2005 (**Appendices I to III**).

Study on conditional fees undertaken by the Law Reform Commission

12. Some Members had pointed out that lawyers were prohibited from entering into a conditional or contingency fee arrangement under existing legislation. However, RAs, which were run by non-legally qualified persons, could operate on a "no win, no fee" basis. They asked whether the operation of RAs would be covered by the study undertaken by the Law Reform Commission (LRC) on conditional fees. SJ had advised that the study was progressing well, but she was unable to say whether the study would discuss the possible regulation of RAs.

13. On 14 September 2005, the LRC's Conditional Fees Sub-committee published its Consultation Paper on Conditional Fees. The Consultation Paper was issued to all Members on 15 September 2005.

14. The focus of the Sub-committee's study is to consider whether conditional fee arrangements are feasible and should be permitted for civil cases in the circumstances of Hong Kong. However, the Sub-committee has, in Chapter 6 of the Consultation Paper on "Arguments for and against conditional fees and related issues", made reference to the problems and regulation of RAs (referred to as "claims intermediaries") in England, and the situation in Hong Kong. A relevant extract from Chapter 6 is in **Appendix IV**.

15. One of the recommendations made by the Sub-committee is that prohibitions against the use of conditional fees in certain types of civil litigation by legal practitioners should be lifted, so that legal practitioners may choose to charge conditional fees in appropriate cases. The Sub-committee considers that conditional fees may appeal to litigants who would have otherwise patronised RAs, which may or may not be qualified or suitably supervised.

Concerns of the Hong Kong Bar Association and the Law Society of Hong Kong

16. The Hong Kong Bar Association and the Law Society of Hong Kong have expressed various concerns about the activities of RAs. In January 2005, the Bar Council appointed the Special Committee on Recovery Agents to deal with issues arising from the phenomenon of non-legally qualified persons interfering in, or encouraging, litigation of reward, and to identify whether the practices of these agents constitute maintenance.

17. In April 2005, the Special Committee produced a report on RAs. RAs are defined as companies which purport to assist victims of personal injuries arising from, primarily, work related accidents, traffic accidents and medical procedures to pursue their claims for compensation in return for a fee as a percentage of the recovered damages (usually from 20 to 25 %). The Special Committee concludes that maintenance and champerty constitute a crime in Hong Kong. The contracts between RAs and accident victims are champertous and cannot be enforced in a court of Hong Kong. Lawyers who knowingly assist in the performance of the contracts or entered into a contingency fee arrangement in the context of litigation may have committed the crime of champerty, and may be in breach of the Legal Practitioners Ordinance and their professional codes of conduct.

18. The Law Society established a working group to look at the activities of RAs in relation to personal injury claims in November 2004. Advice was sought from leading counsel on the legality of a number of contracts entered into by RAs with accident victims. The advice obtained is that the contracts are champertous and are unenforceable. On 17 May 2005, the Law Society issued a circular to its members, advising them that the practice of RAs is a criminal offence in Hong Kong, and lawyers risked committing professional misconduct if they worked on cases financed by RAs.

19. The report of the Bar Association's Special Committee on Recovery Agents, and the circular issued by the Law Society, have been issued to Panel members vide LC Paper Nos. CB(2)1516/04-05 and CB(2)1609/04-05 on 10 and 19 May 2005 respectively.

Relevant papers

20. A list of the relevant papers is in **Appendix V**. These papers are available on the LegCo website (<http://www.legco.gov.hk>).

**Extract from the Official Record of
Proceedings of the Council meeting on 12 June 2002**

PRESIDENT (in Cantonese): Fifth question.

Agents Handling Claims for Accident Compensation

5. **MISS MARGARET NG** (in Cantonese): *Madam President, it has been reported that a number of agents that help clients handle their claims for accident compensation have been established one after another. Operating under the pledge of "no win, no charge", such agents enter into contracts with their clients for employing lawyers and paying the necessary fees on the clients' behalf. If the civil case is subsequently lost, the claimant concerned need not pay anything; if the claim is successful, then the agent will take 20% to 30% of the compensation received as its service charge. It is noted that the major clientele of these agents are those who are neither eligible to apply for legal aid nor able to afford the high legal costs. In this connection, will the Government inform this Council:*

- (a) *whether it has taken note of the increase in the number of such agents and taken action to find out how they operate, including the legality of the way they operate;*
- (b) *of the measures it has to remind claimants of the points to note before signing a contract to engage such agents to make compensation claims; and;*
- (c) *whether it has assessed if the increase in the number of such agents reflects inadequacies in the existing legal aid schemes and, in particular, whether the eligibility criteria for the Supplementary Legal Aid Scheme are so demanding that most people are not qualified and have to engage the service of such agents even though they know that such agents reap a higher share of the compensation than that under the Scheme; and whether it will thus review its legal aid policy?*

SECRETARY FOR JUSTICE (in Cantonese): Madam President,

- (a) The Administration is aware that, in the past few years, a number of organizations have advertised services of the kind referred to in this

question. The Department of Justice has looked into the legality of such services. There are certain offences under the Legal Practitioners Ordinance and at common law, and certain rules of legal professional conduct, that are relevant to these organizations. However, non-lawyers can provide certain types of assistance in the recovery of accident compensation, even on a contingency basis, without breaching these provisions. In respect of some advertised services, action has been taken by the Bar Association, Law Society, the Consumer Council or the Department of Justice to find out how they operate. In addition, the Law Society has recently established a working party to look more generally into the activities of such organizations, and the Consumer Council has conducted some preliminary research in respect of them.

- (b) The Administration is not aware of any special measures that are currently in place to remind claimant of points to note before signing the types of contract referred to in the question. However, both the Law Society's Working Party and the Consumer Council are considering whether there is a need for such measures. The Department of Justice will liaise with those two bodies on the way forward.
- (c) Our legal aid policy seeks to ensure that no one with reasonable grounds for taking legal action in Hong Kong is prevented from doing so because of a lack of means. To implement this policy, applicants must pass means and merits tests to qualify for legal aid.

Currently, an applicant with annual financial resources of not more than \$169,700 may apply for legal aid under the Ordinary Scheme. In July 2000, we adjusted the deductible allowances figures to make the Scheme more accessible. As a result, the percentage of households eligible for legal aid has increased from 48% to 58%, covering around 1 million lower and middle income group households.

On top of the Ordinary Scheme, the Legal Aid Department operates a "self-financing" Supplementary Scheme, to provide civil legal aid to an applicant whose financial resources exceed the limit for the Ordinary Scheme, but do not exceed \$471,600. The

Supplementary Scheme provides publicly-funded legal aid to cases which deserve priority for public funding, in the sense that significant injury or injustice to an individual, as distinct from that to a commercial concern, is involved. To ensure its financial viability, it is necessary to confine the Scheme to monetary claims that have a reasonably good chance of recovering damages.

Under the Supplementary Scheme, legal aid is available to cases of personal injury, death, medical, dental or legal professional negligence where the claim for damages is likely to exceed \$60,000. The Scheme also covers claims under the Employees' Compensation Ordinance irrespective of the amount of claim.

In 2001, about 13.2% of legal aid applications processed under the Supplementary Scheme were refused on grounds of merits, 3.3% on grounds of means. These figures do not suggest that the eligibility criteria for the Supplementary Scheme are too demanding. The Administration nonetheless has in place a comprehensive mechanism and timetable to review the financial eligible limits of legal aid applicants. It comprises an annual review to take account of inflation; a biennial review to also reflect changes in litigation costs; and a review every five years of the criteria used to assess financial eligibility of legal aid applicants. We trust that these regular reviews should be sufficient in ensuring that the limits keep pace with the economic realities.

MISS MARGARET NG (in Cantonese): *Madam President, the Secretary for Justice indicated in part (a) of the main reply that the Department of Justice had looked into the legality of such services. May I ask the Secretary for Justice if she knows clearly how these agents operate? The Secretary indicated in the main reply that non-lawyers could provide certain assistance. What assistance was she referring to? Has special attention been paid to the following circumstances? First, given that the agents will pay for the lawsuits lodged on behalf of the claimants, will the former ask the latter to accept unreasonable settlement so as to "recover" the money that has been invested, limit the latter in their choice of lawyers, or ask the latter to sign unreasonable agreements?*

Second, under the existing law, it is a violation of conduct if a lawyer touts business. What is the case if business is touted through certain agents? Has the Secretary studied and investigated if there is participation of lawyers behind such agents? The investigation carried out by the Law Society is not comprehensive enough since it is confined to law firms only.

SECRETARY FOR JUSTICE (in Cantonese): Madam President, during the period between 1999 and June 2002, a total of 25 cases were submitted to us by the Law Society. Four of them are currently under prosecution, and five under investigation. These cases are found to be in breach of either section 45 of the Legal Practitioners Ordinance with respect to unqualified person not to act as solicitor, or section 47 of the Ordinance with respect to unqualified person not to prepare certain instruments. Under the law, all these acts are illegal.

If judging from the evidence obtained, the Department of Justice considers it necessary to carry out investigation, the relevant cases will be referred to the police. Though prosecution action will be taken in some cases, we will notify the Law Society so that similar cases arising in future may be referred to the police direct for investigation. When I met with the President and council members of the Law Society on 24 May, I was told that the Working Party of the Law Society would study this matter in detail and discuss with us how similar matters could be handled after a preliminary conclusion had been drawn. I would like to point out here that the cases mentioned by me earlier are not merely confined to claims for accident compensation. Other cases in breach of the Legal Practitioners Ordinance are included as well.

MR LAU CHIN-SHEK (in Cantonese): *Madam President, the emergence of these agents is simply attributed to the fact that a lot of people are unable to afford the litigation fees or ineligible for legal aid. Will the Secretary inform this Council of the number or percentage of cases recorded in the past two years in which workers injured on duty or their family members were not granted legal aid for failure to pass the means test? Will the Government consider reviewing the scope of legal aid and exempting employees injured on duty from being means-tested if they file a lawsuit with respect to statutory compensation payable to employees?*

SECRETARY FOR JUSTICE (in Cantonese): Madam President, I have to defer to the Chief Secretary for Administration on the part concerning legal aid.

CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese): Madam President, the Secretary for Justice has already cited the relevant figures in the main reply.

MR LAU CHIN-SHEK (in Cantonese): *Madam President, my supplementary question asked about the number or percentage of cases recorded in which workers injured on duty or their family members were not granted legal aid for failure to pass the means test. Furthermore, will the Government consider reviewing the scope of legal aid and exempting employees injured on duty from being means-tested if they file a lawsuit with respect to statutory compensation payable to employees?*

CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese): Madam President, it has been stated clearly in the main reply that about 13% of the relevant applications were refused on grounds of exceeding the income limit. I have at hand some general figures on work-related injuries. I am afraid no breakdown data has been provided to me. The number of cases rejected for exceeding the asset limits appears to be quite small.

PRESIDENT (in Cantonese): Chief Secretary for Administration, this supplementary question involves some statistical figures. If you are unable to immediately analyse the data you have on hand, you may consider giving a written reply.

CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese): Madam President, I do not have figures on individual items on hand. Nonetheless, I am pleased to provide the breakdown figures in detail in due course. (Annex IV)

MR LAU CHIN-SHEK (in Cantonese): *Madam President, the Chief Secretary for Administration has not answered the second part of my supplementary question, that is, the part concerning whether employees injured on duty can be exempted from the means test if they lodge a lawsuit with respect to statutory compensation for employees?*

CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese): Madam President, the Director of Legal Aid is empowered to grant exemption. Actually, we will constantly review the financial eligible limits of legal aid applicants. It has also been mentioned in the main reply that an annual review will be carried out to take account of inflation, and a review every two or five years will be conducted to assess other matters such as methods of compensation. We will certainly review this.

MISS LI FUNG-YING (in Cantonese): *Madam President, the Secretary for Justice pointed out in part (c) of the main reply that 3.3% of legal aid applications were rejected on grounds of means. Has the Secretary considered that, though the figure represents only 3.3% of the applications, some of the applicants were refused on grounds of means because they had just received some burial money from their friends and relatives in mourning for their family member who had unfortunately died in the course work, or they had just received some money from the company of the dead to meet the funeral expenses? Will the Secretary consider exempting the burial money and funeral expenses from the means test when conducting another review in future?*

PRESIDENT (in Cantonese): This question is related to legal aid. Which Secretary will answer this question? Chief Secretary for Administration.

CHIEF SECRETARY FOR ADMINISTRATION (in Cantonese): Madam President, I will be very pleased to include such specific items when conducting the next review.

MR ALBERT HO (in Cantonese): *Madam President, at present, legal practitioners are not allowed to sign agreements with respect to conditional*

payment with litigants, or make arrangement for sharing the amount of compensation with litigants. The original objective of making this regulation was mainly to prevent professionals from involving themselves in conflicts of interests. Nonetheless, it has now come to our notice that non-professionals are not governed by the professional code in this respect. This is because they can avoid being governed by professional conduct through such other means as acting in the name of a company. If they bully the injured or ask them to enter into settlement or sign unreasonable agreements, the injured or the signatory will have no way to air their grievances or lodge a complaint. For these reasons, will the Government consider enacting legislation or formulating policies to safeguard these people from being cheated by unfair or unreasonable agreements?

SECRETARY FOR JUSTICE (in Cantonese): Madam President, under sections 44 and 47 of the Legal Practitioners Ordinance, an unqualified person will be guilty of an offence if he acts as a barrister, a notary public, or a solicitor; an unqualified person will also be guilty of an offence if he prepares certain specified instruments for the purpose of initiating proceedings, property transactions or representations. Furthermore, under common law, assisting or encouraging a party to file a lawsuit may constitute such civil or criminal offences as maintenance or champerty.

"Champerty" can be interpreted as an act of instituting a lawsuit on behalf of a claimant in proceedings not related to one's personal interest, or assisting or encouraging a litigant to file a lawsuit in the absence of legally recognized justifications. The act of champerty performed for the purpose of sharing compensation is a special form of champerty. As the name suggests, it means that the party being encouraged to file a lawsuit undertakes to the party providing support that the latter may, if the lawsuit is won, share part of the benefit. This is in breach of the law. Therefore, if the sole objective of the agents which provide support or assistance to their clients to file a lawsuit is to share their compensation through such mode of operation as "no win, no charge", as pointed out by the Honourable Margaret NG in the main question, the agents will be in breach of the common law. Nevertheless, the crux of the question lies in whether we have received any complaints or obtained sufficient evidence to prove that a certain agent is performing such an act. If so, we will surely institute prosecution.

MR ALBERT HO (in Cantonese): *Madam President, I can absolutely not understand the reply given by the Secretary for Justice earlier. The Secretary remarked in part (a) of the main reply: "However, non-lawyers can provide certain types of assistance in the recovery of accident compensation, even on a contingency basis, without breaching these provisions". My question was actually referring to such circumstances. Can the Secretary explain once again the circumstances she was referring to? The Secretary has not given me a reply with respect to this point.*

SECRETARY FOR JUSTICE (in Cantonese): Madam President, the constitution of an offence depends mainly on evidence. I believe Members are all aware, besides solicitors and barristers, voluntary agencies may also provide legal services for a litigant. As I pointed out just now, if the relevant legal services are not prohibited under the Legal Practitioners Ordinance, for instance, the provision of assistance to a litigant to collect information before a lawsuit, then it does not constitute an act of champerty. Therefore, action can only be taken dependent on the evidence we have obtained. It is not that the police and the Department of Justice are leaving these agents alone. Prosecution will be taken if there is sufficient evidence proving that the law has been infringed.

PRESIDENT (in Cantonese): This Council has spent more than 19 minutes on this question. I am afraid I have to disappoint a number of Members who are still waiting for their turn to raise their supplementary questions. We will now proceed to the sixth question.

~~**Road Tunnel Linking up Shekou and Zhuhai**~~

6. **MR HUI CHEUNG-CHING** (in Cantonese): *Madam President, it has been reported that the Guangdong authorities are currently studying a proposal to construct a road tunnel to link up Shekou of Shenzhen and Zhuhai. In this connection, will the Government inform this Council whether:*

(a) *it knows the details of the proposal;*

(b) *it has evaluated the impact of the infrastructure on the economic and trade development of Hong Kong; and*

**An extract from the speech of Hon Margaret NG
at the Council meeting on 26 January 2005**

~~modernized and the Government has the duty to facilitate this instead of obstructing the process. Let me name just a few issues.~~

~~First, Solicitors Corporation. The primary legislation enabling solicitors to practise in limited companies was passed in 1997. Yet today, it has not been implemented. Numerous drafts of the Rules have been submitted by The Law Society of Hong Kong, and was each time delayed because the Government demanded further changes.~~

~~Second, Solicitors Professional Indemnity Scheme. While the present scheme needs to be amended urgently so that solicitors do not have to be insurers for each other, the Government is taking the intransigent and unrealistic stance that it will not support the change chosen by members of The Law Society of Hong Kong unless it includes insurance against the insurance company becoming insolvent. No professional indemnity in the world carries such a condition.~~

~~Third, limited liability practice. This is now permitted in England, in the United States, in Australia and New Zealand among other places. But in Hong Kong, we have difficulty even pinning down which of the Policy Bureaux is responsible for considering it.~~

Second, development of legal services. There are developments undermining professional service. An increasing source of concern is claim assessors. While lawyers offer the better protection for the interests of members of the public, they are precluded by their code of conduct from soliciting business, or to offer contingency or conditional fees arrangements. By contrast, claim assessors are unregulated. They can canvass for business in the waiting rooms of physiotherapists or hospitals; they can offer to charge no fees but just take a percentage of the compensation they obtain from the potential defendants, usually insurance companies. The downside which is not always made known to the client is that he may not be advised of the true compensation he is entitled to. I urge the Government to look into the propriety and desirability of this from both the public's and the profession's point of view, and take steps to enhance public awareness.

~~I have spoken repeatedly on the use of lay prosecutors in Magistrates' Courts with the result that briefing out to lawyers in private practice is now a rarity. With the stable provision of an abundance of qualified lawyers, the Prosecution Authorities should upgrade prosecution work. Cost saving is no~~

**An extract from the speech of Hon LI Kwok-ying
at the Council meeting on 26 January 2005**



~~also unnecessary. The DAB considers that since their main business on the Mainland normally involves external legal services, it is therefore not really necessary to require Hong Kong lawyers to pass the relevant examination before they can be qualified for practice. Of course, external services also involve mainland affairs and Hong Kong lawyers cannot know nothing about mainland laws. Thus, we propose that if Hong Kong lawyers are involved mainly in providing external services, the requirement of passing the examination can be relaxed. For example, they can only be required to pass a "benchmark examination" on basic mainland legal knowledge, or they can be required to take certain relevant subjects of the mainland practice examination.~~

We also consider that the signing of CEPA only marks the beginning of the development of co-operation between the Hong Kong and mainland legal services industries, and there are still more areas under CEPA which merit continued enhancement and expansion. In order to develop Hong Kong's stable and sustainable legal services and realize the win-win situation of mutually benefitting Hong Kong and the Mainland and supplementing each other's strengths, the DAB hopes that the SAR Government can continue to discuss with the relevant Central Authorities and perfect the relevant provisions and mechanisms. Moreover, the Government also has to spare no efforts in assisting the industry in Hong Kong and on the Mainland to enhance co-operation ~~and promote the exchange of talents.~~

Madam President, I would like to talk about the recent emergence of compensation recovery companies and the problems they have caused, hoping that the Chief Executive and the relevant officials can pay attention. The compensation recovery companies focus on cases seeking compensation for bodily injuries. They will represent the injured party in looking for a lawyer to claim compensation. There is nothing wrong with the emergence of this type of service industry in Hong Kong which plays the role of a middleman, however, the development of compensation recovery companies seriously affect the development of solicitors' firms. More importantly, the reason for the development of this kind of companies originates from the loopholes in some Hong Kong laws. It can be said that these companies pose improper competition to solicitors' firms.

The problems caused by compensation recovery companies concern mainly three aspects. First, the compensation recovery companies provide legal advice to the injured claimants, including recommendations on whether or

not to initiate proceedings and the claims amount. This should be the work of lawyers but is now provided by staff of those companies who have not received professional legal training. This is simply irresponsible. When providing legal advice, Hong Kong lawyers are subject to different supervision in law, but those companies do not have legal authorization, nor are they subject to supervision. They are providing legal advice without the supervision of any professional bodies, and are at the same time avoiding the legal requirements. Moreover, at present, lawyers are strictly prohibited by regulations to make the so-called "no win no gain" service undertaking, but such regulations do not apply to the compensation recovery companies. Consequently, these companies are given the opportunity to take advantage of loopholes in law. Finally, since some compensation recovery companies are linked to solicitors' firms, the claimants are referred to the solicitors' firms by those companies for follow-up action. However, the compensation recovery companies very often "manipulate" the cases and the contact with claimants and play a leading role from suggesting the claims amount to giving advice on the cases. As a result, lawyers cannot have direct contact with their clients. Under the circumstances that lawyers do not have the opportunity of making the most direct contact with the claimants, their legal advice may thus not be the most beneficial to the claimants, thereby affecting their interests ultimately.

In face of the problems caused by these compensation recovery companies, the public cannot see the police or the authorities concerned tackling them seriously. Up to now, no effective deterrent measure has been taken, including making prosecutions, considering legislative amendment, and so on.

Madam President, we hope that the SAR Government can pay close attention to the problems, make efforts to solve the social problems one by one, and fulfil the title of the policy address: Working Together for Economic Development and Social Harmony.

Madam President, I so submit.

~~MR ALBERT HO (in Cantonese): Madam President, in the very lengthy policy address delivered by the Chief Executive, his declaration of self-confession of identifying inadequacies and self-conviction was the focus of attention. Actually, the numerous inadequacies identified by the Chief Executive himself, from his failure to implement "people-based" governance and "address people's~~

Extract from the Official Record of
Proceedings of the Council meeting on 15 June 2005

LEGCO QUESTION NO. 18

(Written Reply)

Date of sitting : 15 June 2005

Asked by : Hon Li Kwok-ying

Replied by : Secretary for Justice

Question :

In her speech during the debate on the 2005 Policy Address at the Council meeting on 27 January this year, the Secretary for Justice pointed out that the Law Society of Hong Kong ("Law Society") and the Consumer Council had studied the operation of claims companies, but there was insufficient evidence to prove that these companies had caused harm to the community, or that control by way of legislation was necessary. However, it has been reported that the Law Society has earlier said that financing accident victims in instituting legal proceedings by claims recovery agents constitutes an act of maintenance or champerty, which should be prosecuted by the Department of Justice. In this connection, will the Government inform this Council:

- (a) whether it has studied if the Law Society has changed its position on whether these claims companies have caused harm to the community; if the study reveals such a change, whether the authorities have asked the Law Society about the reasons for the change as well as the specific harm to the community; if the study reveals otherwise, the rationale for that;
- (b) whether it has assessed if claims companies have been involved in champerty and illegal promotional practice and whether the problem of excessive fee-charging is serious; if the assessment results reveal that such acts are illegal and the problem is serious, of the details and how the authorities will follow up; if the assessment results revealed otherwise, the details of that; and
- (c) as claims companies solicit business by claiming that they will charge on a "no win, no fee" basis, and the Law Reform Commission of Hong Kong is studying this form of fee-charging, whether the authorities know the latest progress of the study, and whether such matters as how to

regularize the operation of claims companies will be covered by the study; if they will not be covered, the reasons for that?

Reply :

Madam President,

This question relates to organizations that assist victims of personal injuries to claim compensation on the basis that they will only charge a fee if the victim succeeds in his claim. These organizations are referred to in the question as "claims companies". However, I will adopt the description used by the Law Society and Bar Association, namely "recovery agents".

There are three parts to this question and I will answer them in the same order.

- (a) In July 2002, the Law Society established a working party to investigate the activities of unqualified persons. This included what was then a relatively unknown category of recovery agents involved particularly in the field of personal injuries. A circular was issued to members of the Law Society advising them of the reservations held by the Law Society if solicitors were to accept instructions from recovery agents. These included the impairment of the solicitor's independence and the client's freedom of choice of solicitor under such arrangements as were believed to be made by recovery agents, and concern that victims of accidents were not receiving the full level of compensation because of the contractual obligation to pay over a percentage frequently as high as 25% to the recovery agents.

In November 2004, the Law Society established a second working party specifically to look at the activities of recovery agents in relation to personal injury claims. This was done because of an awareness of growth in the activities of recovery agents in personal injury claims and concerns at the social implications arising. Advice was obtained from leading counsel on the legality of a number of recovery agents' contracts with accident victims and a circular issued to Law Society members.

The circular emphasized the likelihood of misconduct if solicitors were to act for victims of accidents in claims financed by recovery agents.

I understand that this latest circular does reflect a more robust approach towards the policing of solicitors' actions in respect of recovery agents than in the past. According to the Law Society this is because there is a growing awareness of the activities of recovery agents, concern at their lack of professional indemnity cover against their negligence, allegations of misconduct on the part of those working for them, and concern that there were instances of conflict of interest in the prosecution of claims resolved in favour of the recovery agents to the detriment of the accident victims. There have been allegations as yet unproven that claims had been settled for amounts less than was appropriate and that accident victims who were entitled to legal aid were diverted from such assistance so as to better serve the commercial interests of the recovery agents who would receive up to 25% of the compensation on recovery.

- b) The Department of Justice has studied the activities of recovery agents. It has also received information on them from the Law Society, Bar Association and the Consumer Council. With regard to the possibility that some recovery agents have been involved in champerty or illegal promotional practices, I will deal with this in a moment when I discuss possible prosecutions.

So far as publicity methods are concerned, we understand that recovery agents canvass for business at various places to which accident victims go to seek assistance. They also distribute leaflets and advertise through the internet, newspapers and television. Recovery agents may also employ "claims consultants" to canvass for business.

With regard to the fees payable to recovery agents if the claim is successful, we understand that these generally range from 20% to 25% of the compensation recovered.

The follow-up action in relation to these activities falls into three categories.

- (i) The first is public education of the possible risks involved in using the services of recovery agents, and of the availability of legal aid. The Consumer Council published an article on the former in "Choice" magazine and has encouraged the Legal Aid Department to promote its services as an alternative to those of recovery agents.

As part of its annual program of activities, the Legal Aid Department through its professional staff has been paying regular visits, and delivering talks, to NGOs promoting the availability of legal aid. It has also published an article in the LAD News, the target readers of which are the general public, explaining the advantages of undertaking litigation with the assistance of legal aid while drawing the public's attention to the possible pitfalls of seeking help from recovering agents to pursue a claim in court.

The Social Welfare Department continues to advise all applicants for Traffic Accident Victims Assistance of their right to claim compensation against any party at fault, through a solicitor or the Legal Aid Department.

- (ii) The second possible action is to bring a prosecution against a recovery agent if there is sufficient evidence that it has committed any offence. The Department of Justice does not investigate possible offences and only considers bringing a prosecution if evidence is referred to it by law enforcement agencies or others. My department has advised the Law Society, Bar Association and Consumer Council that, if they discover any evidence of criminal conduct by recovery agents, this can be referred to the police. So far, there has been no case in which sufficient evidence of an offence by a recovery agent has been produced to my department to warrant a prosecution. I understand that the Consumer Council is in the process of referring one recent complaint to the Police. It remains to be seen whether there is sufficient evidence to bring a prosecution in that case.
- (iii) The third type of action has been to consider whether legislation should be introduced to regulate recovery agents. The Department of Justice was informed by the Consumer Council in

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February of this year that it had not received any complaints from members of the public about the activities of recovery agents. We have now been informed that there has been one recent complaint. However, I do not consider that there is sufficient justification for legislating at the present time. My department will nonetheless continue to monitor the situation.

With regard to the position of the Law Society, as the regulatory body for practising solicitors, it is entirely appropriate for it to issue advice to its members on their professional duties in relation to victims represented by recovery agents.

- (c) The Law Reform Commission study of conditional fees (or "no win, no fee arrangements") is progressing well. It is expected that a consultation paper on the subject will be published within the next few months. At this stage, I am not able to say whether or not the paper will discuss the possible regulation of claims companies.

Extract from Chapter 6 of Consultation Paper on Conditional Fees

~~deletion of the requirement may convince counsel to take on the case.~~

- (iv) *Counsel's fees as disbursements* – A small number of ATE insurance providers are able to treat counsel's fees as disbursements and so counsel will be paid, win or lose.

6.37 These points should be borne in mind in devising any scheme of event-triggered fees in Hong Kong. It falls to be considered whether barristers should be subject to a higher maximum uplift than solicitors, to mitigate the difficulty of finding a competent barrister to represent clients who have a worthy cause but require conditional fee financing. An alternative would be to explore the possibility of ATE insurers including counsel's fees as disbursements as a normal practice.

Insurance

6.38 It is apparent that the availability of insurance is a key factor in making the conditional fee system work. Whether the market in Hong Kong is large enough to allow a number of insurance companies to compete and survive should be investigated and considered.

6.39 It may be useful to note that in England, when conditional fee agreements first became lawful in 1995, only the Law Society-approved "Accident Line Protect" was available, offering a low fixed premium of £85 per case regardless of the type or value to members of the Personal Injury Panel.⁴³ Within three years, the scheme was in difficulties, primarily through adverse selection of cases by solicitors.

6.40 Since 1995, providers of ATE insurance have grown to around a dozen. In reality, the majority are brokers and the number of underwriters operating in the market is around five.⁴⁴ However, underwriters have suffered greater losses than they had anticipated, and there is a danger that in the near future the demand for ATE insurance may not be fully met.⁴⁵

6.41 An issue which needs to be considered is whether the recoverability of ATE premiums and success fees has any impact on the level of insurance premiums and the availability of ATE insurance.

Intermediaries

6.42 Since the abolition of criminal and civil liability for champerty and maintenance, claims intermediaries sometimes referred to as compensation claims agents, claims management companies or claim farmers, have proliferated in England, typically by maintaining a high profile through

⁴³ Contrast the premium of £367.50 (tax inclusive) in *Callery v Gray* in 2000.

⁴⁴ M Harvey "Guide to Conditional Fee Agreements" Jordans 2002 at 115.

⁴⁵ As above.

aggressive TV marketing campaigns. Concern over the activities of claims intermediaries has been a constant theme over the last few years. The collapse of Claims Direct, the Accident Group and others has focused attention on the business models of claims intermediaries. Allegations of high-pressure sales, exaggerated or low-quality claims, expensive and opaque insurance products covering items that are irrecoverable between the parties, and high-interest loans to clients with no credit checks have served to paint a poor picture of this sector. Clients often have not fully understood the liabilities they were undertaking when signing up for insurance and loans offered to them by the sales agents to facilitate the claim. Many respondents to the consultation expressed concern at the way in which some intermediaries obtained their business, and the suitability of ATE insurance and loan products sold to claimants. In some instances, it is questionable whether claims intermediaries add value or simply an extra costly tier to the claims process.

6.43 According to the views collected by the UK Department for Constitutional Affairs from its consultation exercise in 2003,⁴⁶ a number of problems have emerged in the claims intermediaries sector, which are summarised as follows:

"Many respondents expressed grave concerns over the behaviour and conduct of claims intermediaries in marketing and selling their products. Unlike solicitors, who are bound by a professional code of conduct, claims intermediaries are unregulated. However, the respondents also recognised the important role that intermediaries have in informing consumers of their legal rights. The respondents suggested that regulations should be considered to control the activities of these intermediaries.

The Law Society believed that it was crucial that the claims management industry be subject to regulation if they were to be involved in the provision of advice under CFAs. Citizens Advice suggested that primary legislation be introduced to bring claims intermediaries within the scope of legal services regulation. The Federation of Small Business (FSB) stated that CFAs had encouraged the emergence of claims farmers who derive their income from persuading clients to make a claim without any real investment in the merits of the action. The FSB also felt that claims were now more complex, with each claim being broken down so that every small detail is priced. This has increased the costs of claims. The FSB would like to see a simpler system for making claims, and proposed that some restrictions should be placed on the various types of claim made under CFAs."

⁴⁶ DCA, *Consultation Paper on Simplifying CFAs*, June 2003.

Regulation of claims intermediaries in England

6.44 There is some existing regulation of aspects of the legal and financial package services that claims intermediaries offer to the public. For example, the Law Society and the Bar Council regulate the conduct of solicitors and barristers respectively who work with, or take work from, these companies. Their activities may be covered by trading standards legislation, including the supply of goods and services, unfair contract terms and trade descriptions. Their advertisements are under the purview of the Advertising Standards Authority and the Office for Communications. There is, however, no sector-specific regulation.

6.45 In 2003 and 2004, the sudden collapse of several claims intermediaries gave rise to concerns from consumers and solicitors. At present, claims intermediaries in England may join the Claims Standards Council on a voluntary basis. Only a small proportion of claims intermediaries have opted to join the Claims Standards Council. In November 2004, the UK Government proposed that the Claims Standards Council should work vigorously towards approval of its code of practice by the Office of Fair Trading, with the hope that the code of practice would raise the standards of claims intermediaries.

6.46 In December 2004, the Final Report by Sir David Clementi on the Review of the Regulatory Framework for Legal Services in England and Wales was published and claims intermediaries were identified as one of the regulatory gaps.⁴⁷ The UK Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer announced on 21 March 2005 that a White Paper would be released later in 2005 followed by legislation to reform the market for legal services. That legislation will include new provisions specifically to bring the claims intermediaries within the regulatory net.

Mode of operation of claims intermediaries in Hong Kong

6.47 There is anecdotal evidence that compensation claims agents are becoming more active in Hong Kong. While the fact that unregulated and unqualified persons are providing legal services to the public may be a cause for concern, there have been no serious complaints about the operation of Hong Kong compensation claims agents. The Consumer Council, for example, has no record over the past two years of any complaint against such organisations, although the Consumer Council has acknowledged that this does not necessarily indicate that there have been no unfair practices.

6.48 According to an article in the Consumer Council's "Choice" magazine, claims intermediaries operate under the pledge of "no win, no fees". They employ lawyers on behalf of the client and will pay the necessary disbursements up front. If no recovery is made, the claimant need not pay anything. If the claim results in recovery, the intermediary will usually take

⁴⁷ For an earlier review, see The Blackwell Report published in April 2000.

20% - 30% of the compensation received as a service charge. Claims intermediaries therefore select their clients and accept those cases which are more likely to win.⁴⁸

6.49 There are unsubstantiated reports that some claims intermediaries are run by solicitors using a limited company as the business vehicle. Salesmen are employed to solicit business, sometimes by approaching accident victims in hospitals. There is also anecdotal evidence that some claims intermediaries have approached legally-aided clients and attempted to persuade them to abandon legal aid.

6.50 Preliminary research by the Consumer Council indicates that advertisements for these services do not appear to be widespread in the mainstream media, though some claims intermediaries advertise on websites, through telephone listings, or in publications that are distributed free of charge. However, in August 2002, a claims intermediary advertised its services on a local Chinese TV channel. This may be a sign that claims intermediaries have become more widespread and are employing more aggressive marketing tactics.

6.51 Given that legal practitioners are not allowed to charge any form of event-triggered fees, the services offered by claims intermediaries are unique, as they operate on a contingency fee basis similar to that adopted in the United States.

Relevant regulations and rules

6.52 We noted earlier in this paper⁴⁹ that a solicitor may not enter into a conditional or contingency fee arrangement to act in contentious business. That restriction stems from legislation, conduct rules and the common law offences of champerty and maintenance. Therefore, if a legal practitioner uses a claims intermediaries company as a facade to charge contingency fees, he may be guilty of the common law offence and may have contravened relevant legislation and professional conduct rules.

6.53 If a solicitor or barrister accepts referrals from claims intermediaries, and in return offers kickbacks or shares profits with the intermediary, that may amount to a breach of rule 4 of the Solicitors' Practice Rules (which prohibits the sharing of fees with non-qualified persons) or paragraph 92 of the Bar Code (which prohibits a barrister from giving a commission or present to any person who introduces work to him).

6.54 Persons other than solicitors and barristers, depending on the facts of the case, may be caught under the Legal Practitioners Ordinance (Cap 159), which makes it an offence for a person to practise as a barrister or

⁴⁸ November 2002. There are, however, anecdotal evidence showing that sometimes compensation claims agents will take on even weak or wholly unmeritorious cases for their nuisance value, if they believe that the defendant can be forced into settlement.

⁴⁹ Chapter 1.

notary public, or to act as a solicitor, if he is not qualified to do so. There are also offences in respect of unqualified persons who prepare certain documents relating to the commencement and conduct of proceedings.⁵⁰

6.55 Unqualified persons may, depending on the facts of the case, be guilty of the common law offence of maintenance and champerty. Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action.

6.56 There have been cases where organisations have been prosecuted for, and convicted of, being unqualified persons who act as solicitors. However, these cases were not specifically related to accident compensation assistance. The Bar Association recently issued a report on recovery agents. The Law Society issued a circular on 17 May 2005 to its members, advising them that the practice of recovery agents is a criminal offence in Hong Kong, and lawyers risked committing professional misconduct if they worked on cases financed by recovery agents.

Pros and cons

6.57 The Consumer Council is of the view that if services offered by claims intermediaries are widely accepted by the public, this may reflect the fact that the existing legal sector has not fully met the needs of the general public. The Consumer Council also noted that the major clientele of claims intermediaries are those who are not eligible for legal aid but do not have the means to afford the normal litigation costs. It could be argued that these intermediaries provide a service to those whose needs would otherwise remain unmet by conventionally funded legal services.

6.58 The “no win, no fee” arrangements provided by claims intermediaries could be said to provide the client with a clear delineation of the extent of his costs liability, in contrast to the conventional time-cost basis on which lawyers charge. It could be argued that the time-cost approach to charging presents the lawyer with an interest in procrastination and delay, in marked contrast to the claims intermediary’s interest in speedy settlement and maximising the amount of compensation.

6.59 On the other hand, some are sceptical of the operation of claims intermediaries for reasons which include:

- (i) The background, training or knowledge of claims intermediaries is unknown.

⁵⁰ Also in respect of some documents on conveyancing and the administration of a deceased person's property.

- (ii) The level of supervision is unknown.
- (iii) There is a serious risk of conflict of interest in that disbursements such as medical fees or other experts' fees are kept to a minimum (because the claims intermediary pays for these fees himself) in the hope of a settlement, with the result that cases are not properly advised, assessed or prepared for trial.
- (iv) There is a risk that settlements are reached on commercial considerations, and not according to the best interests of the claimants. For example, substantial claims may be settled for relatively modest sums to the detriment of the claimant.
- (v) For clients who have a strong claim which is likely to result in a substantial award, the client may end up paying more than he would under a conventional time-cost arrangement.
- (vi) If the case is lost and the compensation claims agent is unable or unwilling to pay the opponents' legal costs, the client has virtually no protection, given that it is likely that the claims intermediary is uninsured and has limited liability.

The impact of allowing legal practitioners to charge event-triggered fees on claims intermediaries

6.60 If legal practitioners in Hong Kong are allowed to charge event-triggered fees, and if the common law offences of maintenance and champerty are abolished, those changes are likely to impact on claims intermediaries. On the one hand, legal practitioners will become more price-competitive, which may take away business from the claims intermediaries. On the other hand, claims intermediaries may employ aggressive marketing techniques to enhance their share of the litigation market, as in the case of England.

6.61 There is no evidence to suggest that if claims intermediaries were not available their clients would avail themselves of conventional legal services provided by the legal profession. Indeed, as we pointed out above, the Consumer Council believed that the majority of claims intermediaries' clients were persons who fell outside the legal aid net, and who could not afford to engage a lawyer on their own account.

The Hong Kong situation

Access to the courts

~~6.62 Access to the courts is one of the fundamental rights~~

Recovery agents

Relevant papers/documents

LC Paper No.

Papers/Documents

Submissions received by the Panel

- CB(2)1516/04-05(01) -- An Executive Summary and a report on "Recovery Agents" from the Special Committee on Recovery Agents of the Hong Kong Bar Association
(English version only)
- CB(2)1609/04-05(01) -- A circular on "Recovery Agents" issued by the Law Society of Hong Kong to its members on 17 May 2005
(English version only)

Minutes of meetings of Panel on Administration of Justice and Legal Services

- CB(2)2615/01-02 -- Minutes of meeting on 25 April 2002
- CB(2)710/04-05 -- Minutes of meeting on 14 December 2004

Questions and motions raised/moved at Council meetings

Oral question on "Agents handling claims for accident compensation" raised by Hon Margaret NG at the Council meeting on 12 June 2002

Debate on the 2005 Policy Address at the Council meeting on 26 January 2005

Written question on "Operation of claims companies" raised by Hon LI Kwok-ying at the Council meeting on 15 June 2005